BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY DEAN RIDGE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,018,782
HUMBOLDT INDUSTRIES, INC.	)	
Respondent	)	
AND	)	
	)	
SENTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the January 3, 2008 Award of Administrative Law Judge Thomas Klein. Claimant's award was limited to a 10 percent disability to the body as a whole on a functional basis after the Administrative Law Judge (ALJ) found that claimant failed to respond to two offers of accommodation provided by respondent in two separate letters sent to claimant in 2005.

Claimant appeared by his attorney, Kala Spigarelli of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Larry D. Shoaf of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, as was stipulated at oral argument to the Board, respondent provided a printout displaying the weeks and amounts of temporary total disability (TTD) benefits paid in this matter. The fax printout received April 8, 2008, was considered by the Board in determining this matter. The Board heard oral argument on April 2, 2008.

ISSUES

1. Did the ALJ take judicial[1] notice of the Evidentiary Deposition of Jerry Hardin taken in *Cooper v. Agco*, Docket No. 1,019,518, on June 27, 2007, and filed July 30, 2007? If so, did the ALJ err in so considering that deposition? If not, can the Board take judicial notice of that deposition?

2. Did the ALJ take judicial notice of the Probate File in *The Matter of the Estate of Ruth E. Ridge*, filed on August 1, 2007? If so, did the ALJ err in so considering that file? If not, can the Board take judicial notice of that file?

3. What is the nature and extent of claimant's disability? Claimant was awarded a 10 percent disability to the body as a whole on a functional basis, but denied additional work disability after the ALJ found claimant had not responded to two offers of accommodation provided to claimant by respondent. Claimant argues that he is permanently and totally disabled as the result of the injuries suffered on April 20, 2004. In the alternative, claimant argues that he has suffered a permanent partial work disability in excess of the whole body functional impairment which was awarded. Respondent argues that claimant was offered a job within his sedentary restrictions on two occasions, but failed to respond to those offers. Additionally, claimant failed to put forth any effort to find a job after leaving respondent's employment in January 2005. Respondent argues claimant should be limited to a whole body functional impairment of 7 percent based on the opinion of board certified internal medicine specialist Chris D. Fevurly, M.D.

4. Is claimant entitled to TTD compensation for the period from April 20, 2004, through July 7, 2004?

FINDINGS OF FACT

Claimant, a long-term employee of respondent, suffered a work-related injury to his low back on April 20, 2004, when a forklift, which was being used to load pallets on

[1] An administrative law judge cannot take judicial notice of a matter because he or she is not a member of the judicial branch of government. However, an administrative law judge can take "official notice" of a matter.

claimant's trailer, struck him, injuring his back. Claimant had pain in his back and down his legs. He was referred for medical treatment and taken off work. He was later referred for an MRI at Neosho Memorial Hospital. Based on the results of the MRI, claimant was then referred to neurosurgeon Jacob Amrani, M.D. On July 7, 2004, claimant underwent a fusion at L3-L4 under the hands of Dr. Amrani. The results of the surgery were less than desirable. After the surgery, claimant still had pain and his legs were numb. Claimant was returned to light-duty work by Dr. Amrani in November 2004, with a 25-pound weight restriction.

Claimant initially worked light duty in the paint booth using a paint sprayer. Claimant continued experiencing pain while he worked. At some point, claimant's restrictions were raised to a 50-pound limit. Claimant worked until January 2, 2005.[2] Due to the ongoing problems, Dr. Amrani ordered a CT to determine if there was a problem with the fusion. Claimant was then sent to Dr. Randall Hendricks, an orthopedic surgeon in Tulsa, Oklahoma. Dr. Hendricks was provided the CT myelogram films and recommended a thin-cut CT scan. Claimant then requested a change of treating physician. Claimant was referred back to Dr. Amrani in March 2005 and the thin-cut CT was performed. The indication from the tests was that the fusion had not healed. Dr. Amrani then suggested another surgery. Claimant was, then, granted a change of physician.

Claimant was referred to board certified orthopedic surgeon Douglas C. Burton, M.D., at the University of Kansas School of Medicine. Dr. Burton suspected the fusion had not healed. After reviewing the CT myelogram, his impression was pseudoarthrosis status post fusion. But he was not sure if the bones had fused. He testified that the only way to know for sure was with surgery, and Dr. Burton would not recommend that claimant have another surgery. Dr. Burton did recommend that claimant undergo a functional capacities evaluation (FCE), which was performed on December 6, 2005. The FCE results indicated symptom exaggeration, but contained no indication whether the test was or was not valid. On October 18, 2005, Dr. Burton gave claimant light-duty, sedentary restrictions. After reviewing the FCE, Dr. Burton gave claimant permanent restrictions of sedentary work with occasional lifting up to 10 pounds and negligible frequent or constant lifting. He also explained that sedentary work meant either sitting or standing, depending on claimant's comfort level. Frequent bending, twisting and stooping was also prohibited, and claimant was limited to an 8-hour workday. Dr. Burton rated claimant at between 10 percent and 20 percent based on the fourth edition of the AMA *Guides*.[3] Dr. Burton was provided a list of tasks compiled by vocational expert Jerry Hardin. Of the 17 non-duplicative tasks on the

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[2] R.H. Trans. at 27. (Claimant testified at the preliminary hearing that he worked until January 4, 2005. See P.H. Trans. at 13. And Larry Johnson, respondent's plant manager, testified that claimant's last day was January 4, 2005. See Johnson Depo. at 17.)

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

list, Dr. Burton opined claimant was still able to perform only 3 for an 82.35 percent task loss.

Claimant testified that after leaving respondent, he continued to call in to talk to Mr. Johnson about the availability of work within claimant's restrictions. Claimant testified that he was never offered a job which was a permanent sedentary job. Claimant called in to respondent until April 2005. At that time, he was told by Mr. Johnson to not call anymore.[4] Claimant has not looked for work since that time. At the time of the regular hearing, claimant was receiving Social Security disability benefits.

Larry Johnson, respondent's plant manager, testified that claimant was returned to work, light duty, after the surgery. Claimant was placed in the paint booth where claimant used an air paint sprayer. Mr. Johnson testified that claimant was not asked to work outside his restrictions as they existed at the time, and was provided assistance with the heavier lifting. When claimant's restrictions were raised to 50 pounds, he began doing some grinding and was moving different items around. Mr. Johnson acknowledged that claimant was not able to return to the shipping and receiving department, where he worked before the injury. He also testified that claimant was a very good worker.

After claimant left respondent, Mr. Johnson was asked by the insurance company if there was work that claimant could perform. He was asked to find work available for claimant within his restrictions. Mr. Johnson put together several tasks from several different jobs for claimant, all within claimant's sedentary restrictions. This was not a specific single job that had ever been done by one person. Mr. Johnson simply took different tasks from several people and made them into one job for claimant. After Mr. Johnson had put the job together, a letter was sent to claimant, dated February 4, 2005, advising that respondent had work within claimant's restrictions. Claimant did not respond to the letter. A second letter, this time sent certified, was mailed March 9, 2005, again offering claimant work within his restrictions. Claimant again failed to respond to the letter. After claimant failed to respond to the second letter, Mr. Johnson called claimant and arranged a meeting. Claimant came to respondent's plant and met with Mr. Johnson. Claimant was offered the job created by Mr. Johnson, but claimant refused the offer, telling Mr. Johnson that he could not do a sitting job.[5] At that time, Mr. Johnson told claimant he did not need to call respondent anymore about available work.

Claimant was referred by respondent to Dr. Fevurly for an examination on April 13, 2007. Dr. Fevurly diagnosed claimant with a fusion at either L2-3 or L3-4, depending on

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[4] R.H. Trans. at 33-34.

[5] Johnson Depo. at 61.

which report was read.[6] Claimant's history is significant as claimant had back surgery in 2002 involving a discectomy and decompression surgery at L2-3 with Paul O'Boynick, M.D., a neurosurgeon. Claimant had a good result from that surgery.

Dr. Fevurly diagnosed claimant with low back pain following the most recent fusion. It was determined that there was a nonunion of the fusion mass, also called a pseudoarthrosis. Dr. Fevurly agreed that added surgery would not be beneficial to claimant. He assessed claimant a 10 percent permanent partial disability to the whole person, based on the fourth edition of the AMA *Guides*.[7] Of that 10 percent, he opined that 3 percent was from claimant's prior back problems, with 7 percent being from the 2004 accident. He felt claimant was able to work at higher than a sedentary level of activity, with occasional lifting to 25 pounds and frequent lifting limited to 15 pounds. Claimant should also avoid prolonged or repetitive bending and stooping. Dr. Fevurly was provided a list of tasks compiled by vocational expert Dan Zumalt. Of the 15 tasks on the list, Dr. Fevurly determined that claimant could perform 10 for a 33.33 percent task loss.

Respondent requested the ALJ take judicial [*sic*] notice of a deposition of Jerry Hardin taken in another workers compensation file, and of a probate file from the estate of claimant's deceased mother. The ALJ, in the Award, listed both requests in the Record, but did not rule on the motion nor did he list the deposition or the estate file as part of the record. Additionally, in the Award, there is no discussion regarding those requests and no indication whether the ALJ considered them in rendering his decision. Additionally, there is no indication in this record that a hearing was ever held regarding respondent's requests for judicial notice.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act is blank regarding judicial notice, but K.S.A. 60-409 states:

> (a) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.
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> (b) Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of

[6] Claimant testified that the 2004 surgery was at the L3-4 level. (R.H. Trans. at 21.)

[7] AMA *Guides* (4th ed.).

> governmental subdivisions or agencies of this state, and (2) the laws of foreign countries and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.
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> (c) Judicial notice shall be taken of each matter specified in subsection (b) of this section if a party requests it and (1) furnishes the judge sufficient information to enable him or her properly to comply with the request and (2) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

K.S.A. 60-410 states:

> (a) The judge shall afford each party reasonable opportunity to present to him or her information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.
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> (b) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (1) the judge may consult and use any source of pertinent information, whether or not furnished by a party; and (2) no exclusionary rule except a valid claim of privilege shall apply.
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> (c) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince the judge that a matter falls clearly within K.S.A. 60-409, or if it is insufficient to enable him or her to notice the matter judicially, he or she shall decline to take judicial notice thereof.
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> (d) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within K.S.A. 60-409, shall be a matter for the judge and not for the jury.

Before judicial notice may be taken of a requested matter, the judge must first give each party an opportunity to address the request. Here, no such opportunity appears to have been granted the parties. No hearing was held and there does not appear to be a request for briefs on respondent's request for judicial notice. The ALJ merely listed respondent's requests for judicial notice in the Award, without actually listing either the deposition or the estate file as being part of the record or otherwise ruling on the request.

K.S.A. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted

original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.[8]

As these requests were never actually determined by the ALJ, the Board has no jurisdiction to consider those requests as a matter of first impression. Additionally, neither party requested a hearing before the ALJ on this issue before the case was submitted, and neither party requested that this matter be remanded to the ALJ for such a determination. Therefore, respondent's requests that the Board take judicial notice of the Deposition of Jerry Hardin in *Cooper v. Agco*, Docket No. 1,019,518, and of the file in *The Matter of the Estate of Ruth E. Ridge*, are dismissed, and neither the deposition of Mr. Hardin in *Cooper* nor the estate file are part of the record for the purposes of this appeal.

At oral argument to the Board, claimant's entitlement to additional TTD was discussed. It was not clear from this record how much TTD had been paid and for what dates. The parties agreed that respondent would provide the Board with a printout displaying the dates and amounts of TTD paid in this matter. Respondent complied, providing a printout showing both the dates and amounts of TTD paid. It is determined, from that printout, that claimant was paid TTD during the period requested and no additional TTD is due in this award. The ALJ's denial of additional TTD is affirmed.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

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[8] K.S.A. 44-555c(a).

[9] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 44-501(a).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[12]

There is no medical testimony in this record that claimant is permanently disabled and unable to work. Both Dr. Burton and Dr. Fevurly have returned claimant to work with restrictions. The vocational experts who testified in this matter are diametrical regarding claimant's ability to work and earn wages. Jerry Hardin, claimant's expert, believes claimant to be essentially and realistically unemployable. Dan Zumalt, respondent's expert, believes that claimant has the ability to earn $11.51 per hour without including fringe benefits. Thus, claimant would suffer no loss of wage earning ability. The ALJ determined that claimant has failed to prove that he is permanently and totally disabled, and the Board concurs.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[13]

Dr. Burton determined that claimant had suffered injuries resulting in an impairment between 10 percent and 20 percent to the whole body on a functional basis, based on the fourth edition of the AMA *Guides*. Dr. Fevurly determined claimant suffered a 10 percent impairment to the body on a functional basis, but also determined that 3 percent of that whole body rating was preexisting. The ALJ found the actual disability to be somewhere in between, awarding claimant a 10 percent permanent partial disability to the whole body. The Board finds the functional disability award determined by the ALJ to be supported by the record and affirms same.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of

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[12] K.S.A. 44-510c(a)(2).

[13] K.S.A. 44-510e(a).

> permanent partial general disability shall not be less than the percentage of functional impairment.[14]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[15] and *Copeland.*[16] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[17]

Claimant has put forth no effort to find work. No evidence was submitted as to a job search, and the job offers to claimant by respondent were not responded to. Claimant testified regarding his contacts with Mr. Johnson, but when an actual job offer was made to claimant, his only response was indifference. Additionally, claimant admitted at the regular hearing that by March 2005, he had decided to not return to work, but, instead, intended to pursue whatever compensation was available to him through Social Security and workers compensation. This is a further indication of claimant's lack of desire to obtain a job.

The Board finds that claimant has failed to put forth a good faith effort to retain or obtain employment after his accident. The Board will, therefore, impute a wage to be used to determine what, if any, work disability claimant would be entitled to. Here, respondent

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[14] K.S.A. 44-510e.

[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[17] *Id.* at 320. An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007), and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

had already displayed a willingness to accommodate claimant at a comparable wage. Respondent then went to the effort to combine several tasks that were within claimant's restrictions in an attempt to return claimant to gainful employment. Those efforts were thwarted by claimant's refusal to attempt the offered job.

> [W]here an employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability.[18]

The Board finds the wages paid claimant while he was accommodated should be imputed to claimant in this matter. Therefore, there would be no wage loss suffered had claimant accepted the offered job. Claimant's award would, thus, be limited to his functional impairment of 10 percent to the whole body.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed, with the exception of the discussion of claimant's counsel's entitlement to a fee in this matter, as discussed below. Claimant is awarded a 10 percent permanent partial disability to the whole body on a functional basis, but denied any additional award for a work disability. Claimant is also denied additional TTD.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated January 3, 2008, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, she must file and submit her written contract with claimant to the ALJ for approval.[19]

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[18] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[19] K.S.A. 44-536(b).

IT IS SO ORDERED.

Dated this ____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge